ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
TERRY CRABTREE, JUDGE

DIVISION III

CA 005-1222

May 10, 2006

YELENA GOFORTH	APPELLANT	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. DR2004-916-6]
V.		HONORABLE MARK LINDSAY JUDGE
CALVIN GOFORTH	APPELLEE	AFFIRMED

Appellant Yelena Goforth appeals the trial court's modification order vesting custody of the parties' four children in appellee Calvin Goforth. She contends on appeal that the trial court erred in determining that it was in the children's best interest for appellee to have custody. We affirm.

Appellee and appellant, who was born in Russia but is now an American citizen, were married in 1995. When the parties divorced in June of 2004, they participated in mediation and agreed to share joint custody of their children: sons V.G., then age eleven, and W.G., age six; and daughters L.G., age four, and A.G.,age two. The younger three children were born of the marriage. Appellee adopted the oldest child, who was the offspring of appellant's former marriage. The custody arrangement was for appellee to keep the children every Tuesday and Thursday nights and alternating weekends with appellant to have them the remainder of the time. In May 2005 appellee filed a petition to modify the divorce decree by awarding him sole custody of the children. After a

hearing, the trial court granted the petition, and this appeal followed.

At the outset, we are mindful of our standard of review and the pertinent law. It is well settled that the primary concern in child-custody cases is the child's welfare and best interest; all other considerations are merely secondary. *Eaton v. Dixon,* 69 Ark. App. 9, 9 S.W.3d 535 (2000). Before a custody order can be changed, the court must be presented with proof of material facts which were unknown to the court at the time of the initial custody order or proof that conditions have so materially changed as to warrant a custody modification and that the best interest of the child requires it. *Carver v. May,* 81 Ark. App. 292, 101 S.W.3d 256 (2003). After it is shown that there has been a material change in circumstances, the court, rather than requiring the petitioning parent to show an adverse impact on the child from the material change in circumstances, should weigh the material changes and consider the best interests of the children. *See Calhoun v. Calhoun,* 84 Ark. App. 158, 138 S.W.3d 689 (2003). Although the fact that a parent had been the primary caretaker is relevant and worthy of consideration in determining which parent should be granted custody, it is not in and of itself determinative: the unyielding consideration in determining child custody is the welfare and best interest of the child. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998).

In cases involving child custody and related matters, we review the case de novo, but we will not reverse a trial judge's findings in this regard unless they are clearly erroneous. *Deluca v. Stapleton,* 79 Ark. App. 138, 84 S.W.3d 892 (2002). Because the question of whether the trial court's findings are clearly erroneous turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest. *Dansby v. Dansby,* 87 Ark. App. 156, ___ S.W.3d ___ (2004).

Although Arkansas Code Annotated section 9-13-101(b)(1)(A)(ii) was amended in 2003 to specifically permit a court to consider an award of joint custody, joint or equally divided custody remains disfavored in Arkansas. *Id.* The crucial factor bearing on the propriety of joint custody is the mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare. *Thompson v. Thompson, supra.* A material change in circumstances can be found where the parties have fallen into such discord that they are unable to cooperate in sharing the physical care of the children. *Word v. Remick,* 75 Ark. App. 390, 58 S.W.3d 422 (2001).

In this appeal, appellant does not contend that no material change in circumstances was shown. She is in agreement that sharing custody proved unworkable because the level of animosity existing between her and appellee was such that they were not able to cooperate with one another concerning the children. Her argument is that the trial court's finding that it was in the children's best interest for appellee to have custody is clearly erroneous.

The record reflects that the three younger children were enrolled in The New School, a private institution serving children from preschool through seventh grade. The principal, Bill Mandrell, testified by deposition that appellant had exhibited inappropriate behavior at the school. She had solicited money from parents whose children also attended the school and had asked some parents, who were not well acquainted with her or the children, to babysit after school. Appellant was also said to have engaged parents and teachers in conversation regarding the divorce and custody issues. She had confronted her niece who also attended the school, calling appellee's family "liars." Mr. Mandrell said that appellant's actions made other parents feel uncomfortable and reluctant for their children to socialize with the parties' children to the point that they did not want appellant to know where they lived. At least one parent would wait in her car for appellant to leave the school

premises before taking her child inside the school so as to avoid any confrontation. It was also reported that appellant had cursed using the "f" word within earshot of students. Mr. Mandrell testified that appellant had berated the youngest child's teacher in the presence of other students. There was also an incident where appellant interrupted another child's parent-teacher conference, during which she asked the teacher for financial assistance. Appellant had asked Mr. Mandrell for money as well. Mr. Mandrell advised appellant in a letter dated November 2004 that her behavior would not be tolerated and warned that the children would not be welcome at the school if it persisted. Appellant did not heed the warning, and in June 2005 the three children were expelled from the school.

The elder daughter, L.G., was in need of speech therapy. Appellee testified that he was willing to pay for a therapist to meet with the child at The New School. He considered it impractical for him to leave work twice a week to transport the child to therapy when it could be done at her school without travel. Appellant, however, arranged for the child to meet with a therapist at a distant school at no charge. Tara Call, the speech pathologist, testified in her deposition that appellant was not pleasant to be around, and that appellant was critical of her and had spoken to her in a harsh manner in front of other children. Appellant was also said to be late to both drop the child off and pick her up from therapy sessions, which caused school personnel to have to look after the child instead of tending to their own responsibilities. Appellant also questioned Ms. Call about being summonsed as a witness to this litigation. Ms. Call said that she had explained to appellant that she had been subpoenaed and was a reluctant witness, but she said that her explanation did not assuage appellant's concerns. Because of the problems experienced with appellant and in an attempt to forestall discussions about this case, it was arranged for appellant to leave and collect the child at the

principal's office.

The record also discloses that in June 2005 appellant took the youngest child to a counselor for the purpose of determining whether appellee had sexually abused the child. The counselor, Barbara Dillon, reported that the child did not appear to be traumatized, but that she did appear to have an intense attachment to appellant and anxiety about separation from her. Ms. Dillon remarked that this might suggest some sort of abuse, but that it could also be attributed to the child's age and the disruption in the family related to the divorce. She could not speak with certainty as to whether or not the child had been molested.

Appellee testified that he was the majority owner of Virtual Incubation Company. As majority owner, he said that he had the flexibility to set his work schedule. He often worked long hours, but he said that he almost never worked late on days that he had the children. Since the divorce, he had resided in his mother's home where his sister and her daughter also lived. He said that the boys slept in their own room, while he and his daughters slept in an "extension" of the home where the girls had their own beds. Appellee testified that he shared the cooking and cleaning duties in the household and that he did laundry. He said that it was not true that he had never kept the children on his own. He testified that he sometimes watched all of the children in the home. He stated that his family was close and that his mother and sisters were willing to help transport the children to school when he could not. Appellee testified that he had the financial resources to care for the children, and if given full custody, he planned to purchase his own home. He said that, if he were granted custody the children, they would be allowed to return to The New School.

Appellee further testified that his youngest daughter, A.G., was not afraid of him. She cried sometimes when he picked her up from appellant's home, but he said that she loves being with him

and that they have a great relationship. Appellee stated that he had not abused A.G. and that he resented the accusation that he had done so. He said that appellant had kept A.G. from visiting with him five times in May 2005. He denied that he had been late to pick up the children. He said that the problems between him and appellant became worse after the children had been expelled from school, and thus he began video-taping the exchanges of the children and recording phone messages left by appellant. Introduced into evidence were video tapes of two visitation exchanges. One purported to portray a denial of visitation with the youngest child. In the other, appellee testified that it showed appellant reaching into the car and twisting his ear. The phone messages, alleged to have been left by appellant, spoke in terms of wishing that appellee were dead and hoping that God would punish him. In one recording, appellee was called a profane name.

Appellee testified that he had never threatened appellant but that she had threatened him. He said that he had not laid a hand on appellant since the divorce but that she had cursed and spit at him in the presence of the children. Appellee claimed that appellant had a habit of arguing over medical treatment recommended for the children for no apparent reason. He said that she sometimes refused to give the children their prescribed medication or that she would stop giving it once the symptoms disappeared, which was against medical advice. Appellee admitted that he had refused to renew the eldest child's passport and that he had refused to allow the children to go on two trips to Russia. He objected to the first trip because appellant proposed to take the two oldest children to Russia for two weeks near the end of the school year. He objected to the other because he did not want the children to travel to a remote area of Russia in the wintertime. Appellee also said that he had not allowed their daughters to visit with appellant the day appellant did leave for Russia and that he had refused to let appellant see them the day she returned.

Appellee's sister, Robyn Goforth, who also lived with their mother, testified that all of the adults in the household cleaned, cooked, and watched the children. She said that she had returned the children home the morning after they had been expelled. She heard appellant tell L.G. that "Your daddy divorced us, so the director of the school has decided you can't come back." Ms. Goforth said that L.G. was upset because she did not get to go to school. Ms. Goforth also said that appellant picked up a handful of rocks and dirt and threw them in her direction. She said appellant had left a message on her answering machine in which appellant called Goforth's daughter a "bastard," and that her daughter had heard the message. Ms. Goforth testified that A.G. was not afraid of appellee and that she sits in his lap, hugs him, and tells him that she loves him.

Sally Goforth, appellee's mother, said that appellee was not a good cook, but that he prepared meals, did his share of the laundry, mowed the yard, and took out the garbage. When she drove the children to appellant's home one day, she sat in the car for ten minutes but could not get appellant to answer the phone. Ms. Goforth then rang the door bell. She said that appellant flew out of the house cursing her and that appellant threw pebbles and dirt in her face.

For her part, appellant testified that the children were her life and that she was alone here in the United States because her family lived in Russia. She said that it was difficult to be in a foreign country without money and family, and that hers was a busy life in that she was a full-time student at the University of Arkansas while she also cared for the children, cooked, did laundry, bought groceries, and kept up with their extracurricular activities. Appellant said that it was appellee who no longer wished to be married and that she had not wanted the divorce. She had gone to counseling, but she said that appellee had refused. Appellant said that she had tried her best to get L.G. to speech therapy on time and that she had tried to get help from appellee, but that their discussions always

ended in an argument. She said that appellee was not always nice when he picked up the children. He had called her a "bitch" and had used the "f" word, and he had video-taped her using one hand, while "showing the finger" with the other hand in the presence of the girls. Appellant testified that appellee was often late to pick up the children and that he used a camera to document the exchanges. She said that this provoked her and that the children did not enjoy being taped. Appellant said that she knew that her messages were being recorded and believed that there would be "falsifications," because a friend of appellee's owned a recording studio. She said that the voice on the tapes did not sound like hers.

Appellant denied throwing dirt and gravel at appellee's mother and sister and said that they had thrown dirt on her. She said that she had not cursed or spat on appellee and that she had not threatened him. She refuted appellee's claim that she had grabbed and twisted his ear and said that she had denied appellee visitation with A.G. only one time. Appellant explained that she had taken A.G. to the counselor because she was concerned about her, and she said that she had not suggested to the counselor that appellee had sexually abused the child. She had not taken the child to a medical doctor because she did not want to subject her to a physical examination and felt that counseling would be less intrusive. Appellant further testified that she had asked the school principal and a teacher for money but that she had not asked any parents at the school for money. She denied having asked other parents to babysit the children. She said that her interruption of a parent-teacher conference was unintentional, as she was not aware that a conference was taking place. Appellant admitted that she had been mad at L.G.'s speech therapist because the therapist had missed two appointments without calling to cancel. Appellant also admitted that she had left the message on appellant's sister's answering machine referring to her child as a "bastard." She said that she

regretted having that emotional outburst.

Ann Hoffman had been a friend of appellant's for three and a half years. She knew appellant to be a loving mother, and she had no concerns about appellant's parenting skills. She said that appellee worked long hours and that appellant had been the primary caretaker of the children. Ms. Hoffman had noticed a change in appellant since the divorce in that she seemed nervous and fearful that appellee would take the children away from her. She had not heard appellant curse, and she said that appellant had told her that she suspected that appellee had abused A.G. Appellant had asked Ms. Hoffman for money, and Ms. Hoffman said that appellant did not become upset when told that she had none to give.

Stacy Crider was also a friend of appellant's, and their children played together. She said that appellant was very attentive and that appellant's home was neat, clean, and comfortably furnished. She stated that appellant had a good relationship with the children and that A.G. worshiped her. She had never seen the children in fear or apprehension of appellant. She testified that appellant had been stressed out about the custody battle and trying to juggle school and the children's activities.

On this record, the trial court decided that it was in the children's best interest for appellee to have custody. The trial court found that appellant's inappropriate behavior had caused the three children to be expelled from school; that appellant had failed to cooperate by insisting that L.G. attend therapy at another school, although therapy could have been provided at the school the child attended; that appellant had engaged in inappropriate and confrontational behavior with the child's therapist; that appellant had falsely accused appellee of molesting A.G.; that appellant had threatened violence against appellee and his family and had taken inappropriate physical action in the presence of the children; and that both parties had taken care of the children.

In opposition to the trial court's findings, appellant's view of the evidence is that she was shown to have been primarily responsible for the care of the children and that she was living in the home where the children had been raised. She points out that appellee works long hours and that the girls do not have their own room in his home. Appellant notes that she was the parent who took L.G. to speech therapy with no help from appellee, and that she had met the children's educational needs as she had found other schools for them to attend. She argues that, despite the communication problems she experienced with those at The New School, the children's education had not been impeded. Appellant maintains that she had been active at the school by attending parent-teacher conferences and that she took part in their extracurricular activities. Appellant emphasizes the difficulties she experienced by living in a foreign land without family and without independent means of support, and by being the mother of four young children as well as a full-time student. She states that, while on occasion her reactions were emotionally charged and inappropriate, her devotion as a mother is beyond reproach.

Although forcefully written, appellant's arguments fail to persuade us that the trial court's decision is clearly erroneous. The testimony and evidence in this case paint a disturbing picture which gave the trial court reason to find that it was in the children's best interest for appellee to be awarded custody. No matter how well-explained, appellant's often erratic behavior was shown to have had a deleterious effect on the children. And, there is nothing in the record to indicate that appellee was not fully capable of being the primary custodian of the children. We affirm.

Affirmed.

BIRD and GLOVER, JJ., agree.